United States Court of Appeals

for the Second Circuit

APPENDIX

74-1940

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ROCHESTER MUSICIANS ASSOCIATION, LOCAL 66 AFFILIATED WITH THE AMERICAN FEDERATION OF MUSICIANS, RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

APPENDIX

ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.
Washington, D. C. 20570.

BATAVIA TIMES, APPELLATE COURT PRINTERS
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September 4, 1974

A. Daniel Fusaro, Clerk
U. S. Court of Appeals
Second Circuit
New Federal Court House
Foley Square
New York, New York 10007

RE: N. L. R. B.
v
Rochester Musicians
Association, Local 66 et al

Docket No. 74-1940

Dear Mr. Fusaro:

At the request of Elliott Moore, Deputy Assoc. General Counsel, N.L.R.B. Building, 1717 Pennsylvania Avenue, N.W., Washington, D.C., we mailed to you today 10 copies of Appendices in the above entitled case. Enclosed please find an Affidavit of Service.

With kindest regards, we are,

Sincerely yours,

THE BATAVIA TIMES PUB. CO.

BY Arthur H. Marshall

AHM:af

Enclosure

9/4

AFFIDAVIT OF SERVICE BY MAIL

RE: N. L. R. B.
v
Rochester Musicians Assocation,
Local 66 et al
Docket No. 74-1940

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 4 day of September, 19 74 I mailed 2 copies of a printed Appendix in the above case, in a sealed, postpaid wrapper, to: each of the following:

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600 Executive Office Building
36 Main Street, West
Rochester, New York 14614
ATTENTION: Sidney J. Salzman, Esq.

Charles Peterson, Treasurer
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at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Elliott Moore, Deputy Assoc. General Counsel, Room 10,
N.L.R.B. Bldg., 1717 Pennsylvania Avenue, Washington, D.C. 20570

Roger J. Grazioplene

Sworn to before me this
4 day of September, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 75

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EXHIBITS.

Chronological List of Relevant Docket Entries.

In the Matter of:
ROCHESTER MUSICIANS ASSOCIATION
LOCAL 66, ETC.

Case No.: 3-CB-1939

8.28.72, Charge filed.

5.17.73, Complaint and Notice of Hearing, dated.

6.1.73, Order rescheduling hearing, dated.

6.25.73, Respondent's Answer, received.

6.26.73, Amendment to Complaint and Notice of Hearing, dated.

6.29.73, General Counsel's Motion to strike affirmative defenses to Respondent's Answer, dated.

7.9.73, Board's telegram stating that General Counsel's Motion to strike affirmative defenses to Respondent's Answer is hereby referred to the Administrative Law Judge for ruling, dated.

7.10.73, Hearing opened.

7.10.73, Hearing closed.

7.26.73, Respondent's telegram requesting extension of time to file brief, dated.

7.26.73, Charging Party's letter opposing Respondent's request for extension of time to file brief, dated.

7.27.73, Board's telegram extending time to file brief, dated.

Chronological List of Relevant Docket Entries.

8.22.73, Administrative Law Judge's Decision issued.

9.21.73, Respondent's Exceptions to the Administrative Law Judge's Decision, received.

9.21.73, Charging Party's Motion to dismiss Respondent's Exceptions, received.

9.26.73, Respondent's Response to Charging Party's Motion to dismiss, dated.

9.27.73, Board's telegram denying Charging Party's Motion to dismiss Respondent's Exceptions, dated.

11.29.73, Board's Decision and Order dated.

Decision.

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Division of Judges
Washington, D.C.

ROCHESTER MUSICIANS ASSOCIATION LOCAL 66 AFFILIATED WITH THE AMERICAN FEDERATION OF MUSICIANS
(CIVIC MUSIC ASSOCIATION)

and

DR. SAMUEL JONES.

Case No. 3-CB-1939

Francis J. Novak, Jr., Esq., Buffalo, N. Y., for the General Counsel.

Sidney J. Salzman, Esq., (Salzman, Salzman and Lipson), Rochester, N. Y., for the Respondent.

John B. McCrory, Esq. (Nixon, Hargrave, Devans & Doyle), Rochester, N. Y., for the Charging Party.

JOSEPHINE H. KLEIN, Administrative Law Judge: Pursuant to a charge filed by Dr. Samuel Jones on August 28, 1972, against Rochester Musicians Association Local 66 affiliated with the American Federation of Musicians (Respondent), a complaint was issued on May 17, 1973 (amended on June 26, 1973), alleging that Respondent violated Section 8(b)(1)(B) of the Act by disciplining Jones for affecting the employment of five musicians. In its answer, Respondent

asserted affirmative defenses based on Section 10(b) of the Act[1] and the doctrine of *"res judicata."* The General Counsel thereupon moved to strike Respondent's affirmative defenses and that motion was referred to me as the Administrative Law Judge assigned to hear the case. I reserved ruling on the General Counsel's motion and will dispose of it in this Decision.

Pursuant to due notice, a trial was conducted in Rochester, New York, on July 10, 1973. All parties were represented by counsel and were afforded full opportunity to be heard, to present oral and written evidence and to examine and cross examine witnesses. However, by agreement of all parties, no oral testimony was presented. Rather, the matter was submitted on the basis of the pleadings, statements of counsel and documentary evidence received on agreement of the parties.

Since the hearing, the Charging Party has filed a brief and Respondent a letter-memorandum. The General Counsel stands on the arguments and authorities set forth in his motion to strike Respondent's affirmative defenses.

Upon the entire record, together with careful consideration of the brief and memorandum, I make the following:

FINDINGS OF FACT

I. Preliminary Findings

The complaint alleges, the answer, as amended at the hearing, admits, and I find that:

A. Respondent is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

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[1] National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.).*

B. The Rochester Civic Music Association, Inc., a New York corporation, with its place of business in Rochester, New York, is the managing agent for the Rochester Philharmonic Orchestra. During the past year, a representative period, the Association had gross revenues in excess of $1,000,000, excluding contributions which because of limitation by the grantor are not available for use for operating expenses. The Association annually receives in excess of $50,000 from points directly outside the State of New York. The Association is and was at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.[2] (Hereafter the Orchestra will be referred to as the employer.)

II. The Unfair Labor Practices

A. *The Issues*

In January 1972,[3] Dr. Jones, as conductor of the Rochester Philharmonic Orchestra, recommended that the contracts of four musicians in the Orchestra not be renewed and that a fifth musician be placed on probation. As a member of the Respondent Union, Jones was thereupon brought up on charges before Respondent's Executive Board. In August, the Executive Board found Jones guilty of the charges and imposed a fine of $1,000 and a 6 months' suspen-

[2] In its answer to the complaint Respondent denied the legal conclusion that the Association was an "employer" within the purview of the Act. However, at no time has Respondent contended or attempted to establish that the Association is not an employer within the Board's statutory jurisdiction. Its position, apparently, is that, under the circumstances presented, the Board should not exercise its jurisdiction in this case.

[3] Except as otherwise noted, all dates herein are in 1972.

sion from union membership. Thereafter the fine was reduced to $250 and the suspension from membership was rescinded.

The complaint alleges that the brining of intra-union charges and the imposition of penalties against Jones were violative of Section 8(b)(1)(B) of the Act. Respondent's primary contentions are that the Union's conduct is time-barred under Section 10(b) and the present complaint was precluded by the General Counsel's dismissal of a prior charge arising out of the same course of conduct by Respondent. Respondent maintains that the present complaint is rendered impermissible by application of the doctrines of "entrapment" or "estoppel," based on the Board's prior refusal to assert jurisdiction over symphony orchestras, including the Rochester Orchestra specifically.

On the substantive side, Respondent contends that, while Jones was concededly a statutory supervisor, the General Counsel has failed to establish that he was entitled to the protection of Section 8(b)(1)(B). Additionally, in its post-trial memorandum Respondent apparently contends that the present complaint should be dismissed under the *"de minimis"* principle.

B. *The Facts*

On February 24 Respondent addressed a letter to Jones setting forth five numbered charges which allegedly had "been lodged with the Board of Directors against" Jones. He was "required" to appear before the Board on March 6, when a hearing would be held. Jones received this letter on February 28. Jones appeared before the Executive Board on March 6, when he was presented with further charges. At his request, the hearing was then postponed.

Decision

On March 20 Jones filed with the Labor Board a charge alleging that Respondent's bringing of intra-union charges against him violated Section 8(b)(1)(B) of the Act. Case No. 3-CB-1828. Under date of March 23, the Regional Director refused to issue a complaint on the ground that "the effect on interstate commerce" of operating a symphony orchestra "is too remote to warrant assertion of the Board's jurisdiction." On August 9, the General Counsel, through the Office of Appeals, affirmed the Regional Director's action on the authority of an Advisory Opinion issued by the Board on July 31, in response to a petition filed by the Orchestra in April. *Rochester Civic Music Association*, 198 NLRB No. 75.

On August 19 the Board had published in the Federal Register a notice of a rule-making proceeding for consideration of the promulgation of a proposed rule for the Board's exercise of jurisdiction over symphony orchestras meeting certain monetary standards. 37 Fed. Reg. 16813.

On either August 21 or 24,[4] Jones was tried *in absentia* by Respondent's Executive Board. He was found guilty and a fine of $1,000 and a 6 months' suspension from union membership were imposed. In the present proceeding no question is presented as to the regularity and fairness of the procedure before the Union's Executive Board. Additionally, at the present hearing the General Counsel said that, while he believed it to be "immaterial," he "would not dispute" the statement by Respondent's counsel that the Union's Executive Board proceeded with its trial of Jones in reliance on the Board's having declined to assert jurisdiction over the Orchestra. Counsel for the Charging Party did not indicate a position on that concession. By stressing the August 19 notice

[4] The record is somewhat confused as to which of these dates is correct. However, this detail is not crucial.

of proposed rule-making, the Orchestra appears to dissent from the General Counsel's concession.

The complaint alleges, and the answer admits, that the present charge was "filed by Dr. Jones on August 28, 1972, and served on Respondent on or about August 28, 1972." However, the record establishes somewhat different timing. The charge was prepared in Rochester, New York, and apparently mailed to the Board on August 23 the date it bears. A copy was served personally on Respondent in Rochester on August 24. The original was received by the Board's Regional Office in Buffalo on August 28. On September 11 the Board served the charge on Respondent, which received it on September 12.

On October 16 the Union's Executive Board, on its own motion, reconsidered the matter and thereupon rescinded Jones' suspension from membership and reduced the fine from $1,000 to $250. In a letter dated October 27 the Union advised Jones of this latest action and notified him that it was "mandatory" that he pay the $250 fine within 10 days or suffer "the sanction of suspension from membership."

On March 2, 1973, the Board issued a rule, effective as of March 7, 1973, assuming jurisdiction over symphony orchestras meeting certain monetary standards. 29 CFR Sec. 103.2. The rule is expressly stated to be applicable to Board proceedings then pending and to all those instituted in the future.

The present complaint was issued on May 17, 1973.

Decision.

C. *Analysis and Conclusions*

1. The Motion to Strike Affirmative Defenses

As previously noted, the General Counsel moved to strike Respondent's two affirmative defenses which contended that the present complaint was barred under Section 10(b) of the Act and under the principle of *"res judicata"* or some related doctrine. Whether or not these defenses are legally or factually correct, it cannot be said that they are sham or otherwise improper. Accordingly, I shall deny the General Counsel's motion to strike. *Delta-Macon Brick & Tile Co.*, 196 NLRB No. 25.[5]

2. Section 10(b)

The first alleged unfair labor practice is the Union's action in bringing Jones up on charges. The complaint as filed alleged that such action occurred "[o]n or about February 24, 1972." As previously noted, Jones received notice of the intra-union charges on February 28. It would appear, therefore, that the limitation period would begin on February 28, rather than February 24. Cf. *Teamsters Local No. 200 (State Sand and Gravel Co.)*, 155 NLRB 273, 274; *Russ Newman Mfg. Co.*, 167 NLRB 1112, 1115, enf'd. 406 F. 2d 1280 (C. A. 5).

In any event, the relevant paragraph of the complaint was later amended to add the words "and on or about March 6, 1972." It was on that date, when Jones appeared before Respondent's Executive Board pursuant to the original notice, that the charges against him were reasserted and additional charges were added.

[5] It may also be noted that the General Counsel did not move for summary judgment and, indeed, did not accede to my recommendation that the parties waive decision by me and stipulate the record directly to the Board.

Also as previously noted, although the complaint alleges that the charge was "served on Respondent on or about August 28, 1972," it was in effect stipulated at the present hearing that Jones' counsel made personal service on Respondent in Rochester on August 24, the day after the charge was prepared and mailed to the Board's Regional Office in Buffalo. Although the Board did not actually receive the charge until August 28, the service on Respondent on August 24 appears to satisfy the Board's Rules and the Board's subsequent "service" on Respondent on September 11 is surplusage.[6]

Thus, with Jones' having received the original intra-union charges on February 28, and the charge having been filed and served on Respondent by August 28, the present complaint was not barred under Section 10(b) of the Act to the extent that it alleged the bringing of intra-union charges against Jones.[7]

The foregoing discussion may be largely academic since, in any event, the complaint also alleges misconduct occurring

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[6] Section 102.14 of the Board's Rules and Regulations reads:

Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The regional director will, as a matter of course, cause a copy of such charge to be served on the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.

Although this language apparently contemplates service after filing is complete, *i.e.* after the document has been received (Sec. 102.114 (b) of the Regulations), it would be overly technical to hold that personal service was ineffective because made before filing by mail was completed by receipt. See Sec. 102.121: "The rules and regulations . . . shall be liberally construed to effectuate the purposes and provisions of the act." The purpose of giving Respondent notice of the charge was effectuated on August 24, 1972.

[7] Further, the reaffirmation and extension of the charges on March 6, 1972, as alleged in an amendment to the complaint made in June 1973, were clearly within the 10(b) period.

clearly within the 6 months immediately preceding the filing of the complaint, namely the Executive Board's trial and decision in August and its reconsideration and reaffirmation of the guilty finding on October 16.

Although there is insufficient evidence to determine when the Executive Board's action would become legally "final," certainly that could not have happened before August 21, when it was taken. It may well not have occurred until October 27, 1972, when Respondent sent Jones a letter summarizing the Union proceedings, including the review on October 16. The October 27 letter concluded by notifying Jones that was "mandatory that [he] pay this fine within ten days from the date on receipt by [him] of this notice," upon penalty of "the sanction of suspension from membership."

It has been definitively established that a charge concerning union discipline is not time-barred until 6-months after the imposition of the discipline becomes final, regardless of when the disciplinary proceeding may have been instituted. *N. L. R. B. v. New Mexico District Council of Carpenters*, 454 F. 2d 1116, enf'g. *New Mexico District Council (A. S. Horner, Inc.)*, 176 NLRB 797, 799, and 177 NLRB 500; *I. B. E. W. Local 716 (Fisk Electric Co.)*, 203 NLRB No. 52, slip op. p. 11.[8]

[8] The Board has held that the Section 10(b) 6-months' limitation period begins when the fine becomes final and is not revived or extended by the Union's threat to institute suit or by the institution of suit for collection. *Communications Workers Local 5550 (American Tel. & Tel.)* 187 NLRB 553; *Communications Workers Local 9511 (Pacific Tel. & Tel. Co.)*, 188 NLRB No. 63; *I.A.M. (Union Carbide Corporation)*, 180 NLRB 875 and 186 NLRB 890. The Court of Appeals for the Fourth Circuit, however, reversed this ruling and held that threats to sue and suits for the collection of fines within the 6-months period were sufficient to warrant a complaint. *Shumate (Union Carbide Corp.)* v. *N.L.R.B.*, 542 F. 2d 717. It is unnecessary to accept the Fourth Circuit's decision in order to hold that the complaint in the present case is not time-barred.

Accordingly, I find and conclude that the present complaint is not barred under Section 10(b) of the Act.

3. The Prior Charge as a Bar

Respondent contends that the Board's dismissal of Jones' prior charge (Case No. 3-CB-1838) on jurisdictional grounds precludes the present complaint. Variously referred to as *"res judicata,"* "estoppel" (either equitable or by judgment), and "entrapment," Respondent's argument is, in essence, that it would be inequitable to hold that it violated the Act by action taken after, and in reliance on, official assurance that the Board was not asserting or exercising jurisdiction over the Orchestra.[9]

As a matter of first impression, Respondent's argument has considerable appeal. Indeed, at one time the Board fully accepted that position and eloquently articulated the equitable considerations underlying it. *Almeida Bus Service,* 99 NLRB 498. However, the Board later expressly overruled the *Almeida* line of cases and at least equally eloquently set forth the rationale for rejecting the contention. *Simeons Mailing Service,* 122 NLRB 81, 84085; *Mitchell Concrete Products Co.,* 137 NLRB 509, 512. These later decisions are the present law and are binding on me in this case.

The Board has consistently declined to permit reopening and reconsideration of complaints previously disposed of under former jurisdictional standards.[10] This ruling has express-

[9] That Respondent acted "in reliance" on the Board's failure to assert jurisdiction over symphony orchestras is assumed even though the trial was held and the initial penalties imposed after the Board had published a proposed rule for the assertion of such jurisdiction.

[10] In this regard, a distinction has been made between complaint and representation cases. Yellow Cab Co. of California, 93 NLRB 766, n. 4.

ly been held applicable to prevent reactivation of a charge on which the Regional Director has refused to issue a complaint on jurisdictional grounds. *Wausau Building & Construction Trades Council (Heiser Ready Mix Co.),* 123 NLRB 1484.

On the Other hand, it is equally well established that the Board may and does apply changed jurisdictional standards retroactively, *i.e.,* to factual situations occurring before the change in standards but brought to the Board in cases pending at the time of the change or instituted thereafter. See *Charleston Transit Co.,* 123 NLRB 1296, n. 1, citing *Optical Workers' Union Local 24859 v. N. L. R. B.,* 227 F. 2d 687, 691 (C. A. 5), cert. denied, 351 U. S. 963. As said in *Charleston Transit:*

> . . . A dismissal in an earlier proceeding on jurisdictional grounds does not preclude the Board from asserting jurisdiction in a new proceeding under its present jurisdictional standards. See *Yellow Cab Company of California,* 93 NLRB 766.

In this connection, the Board makes no distinction between complaint and representation cases. *Simeons Mailing Service, supra,* 123 NLRB at 84.

Apparently the Board has never specifically decided whether a charge alleging the same conduct as that in a previously dismissed charge would constitute a permissible "new" charge under *Charleston Transit* or an attempt to reactivate a dismissed charge, impermissible under *Heiser Ready Mix.* But the rationale in other decisions tends to support the view that the second charge is a permissible "new" charge, with the Section 10(b) limitations period computed from the date of its filing. The Board's primary reason for prohibiting reactivation of dismissed charges is to prevent the injustice to respondents and the administrative burden to the Board

inherent in litigation of "old cases." *Heiser Ready Mix, supra* 123 NLRB at 1485. The Court of Appeals for the Sixth Circuit has apparently so read the Board's rulings, saying in *N. L. R. B. v. Electric Furnace Co.*, 327 F. 2d 373, 375:

> . . . The Board has held that a withdrawn charge cannot support allegations of unfair labor practices, and to allow its reinstatement would circumvent the meaning of § 10(b). . . . Thus after the [original] complaint had been withdrawn and dismissed, it could not be reactivated after the statutory six-month period of limitations had expired.

It appears implied that a dismissal case could be "reactivated" during the 6-month limitations period. Thus, I conclude that even if the two charges filed by Jones covered the same matter, dismissal of the first would not preclude proceedings on the second, with litigation restricted to unfair labor practices allegedly committed within the immediately preceding 6 months. Cf. *N. L. R. B. v. Hod Carries' Local 652*, 351 F. 2d 151, 155 (C. A. 9).

This result comports with accepted common-law principles, under which it is generally held that dismissal of an action on jurisdictional grounds, without consideration of the substantive merits, does not preclude a subsequent action on the same cause of action in a forum of competent jurisdiction. As said in *Madden v. Perry*, 264 F. 2d 169, 175 (C. A. 7), cert. denied, 360 U. S. 931, to equate a jurisdictional dismissal to a decision on the merits "would obviously be unjust. It would make the rule a means of entrapment of the plaintiff." See 1B *Moore's Federal Practice* (2d Ed. Par. 0.405[5]).

Finally, it should be noted that the two charges filed by Jones do not cover the same matters, either legally or factually. The first charge alleged the original bringing of intra-

union charges in February; the second concerned subsequent matters, starting with the "trial" and imposition of penalties in August. That these are legally distinct is clearly established by the Board's rulings under Section 10(b), cited in II C2 above.[11]

Accordingly, I find that the present complaint was not barred under any administrative analogy to or adaption of judicial concepts of *res judicata,* estoppel or similar principles.

4. The Substantive Violation

The only substantive factual issue potentially in dispute was the status of Jones as the Orchestra's "representative for the purpose of collective bargaining or the adjustment of grievances," within the purview of Section 8(b)(1)(B). After Respondent admitted that Jones was a "supervisor" within the meaning of Section 2(11) of the Act, I stated that I would exclude any evidence the parties might offer as to whether he had or exercised the authority to adjust grievances since the Board has held unequivocally that "[a]ll persons who are 'supervisors' within the meaning of Section 2(11) of the Act are employers' 'representatives for the purposes of collective bargaining or the adjustment of grievances' within the purview of Section 8(b)(1)(B) of the Act." *The Newspaper Guild, Erie (Times Publishing Co.),* 196 NLRB No. 159, reaffirmed in *Operating Engineers, Local 501 (Anheuser Busch, Inc.),* 199 NLRB No. 91; *United Brotherhood of Carpenters (Imperial*

[11] This conclusion, of course, is not altered by the fact that either of the two charges would have supported a complaint alleging, and the litigation of, Respondent's entire course of conduct, since "[s]o long as the Board entered the controversy pursuant to a formal charge, it may allege whatever it finds to be part of that controversy." *N.L.R.B.* v. *Kohler Co.,* 220 F. 2d 3, 7 (C.A. 7), quoted in *Fremont Hotel, Inc.,* 162 NLRB 820, 821.

Cabinet Shop) 204 NLRB No. 154; *Patternmakers Association of Detroit (Automotive Pattern Co.),* 203 NLRB No. 166.

The courts have not uniformly approved the Board's broad construction of Section 8(b)(1)(B). For example, in *Meat Cutters Local 81 v. N. L. R. B. (Safeway Stores),* 458 F. 2d 794, the District of Columbia Circuit observed that the person fined was "in addition to being one of the Company's representatives for the adjustment of grievances within the meaning of Section 8(b)(1)(B), a 'supervisor' within the meaning of Section 2(11)." (p. 796, n. 4). After having thus pointed up the difference in the two classes, the court sustained the Board's finding of a violation of Section 8(b)(1)(B) on the clear condition that—

> The rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has performed duties as a management representative. . . . [458 F. 2d at 799, n. 12]

Subsequently the District of Columbia Circuit refused to enforce Board findings that unions violated Section 8(b)(1)(B) by fining supervisors for having performed rank-and-file work during strikes. *I. B. E. W. v. N. L. R. B. (Florida Power & Light Co.),* F. 2d , 83 LRRM 2882. In both cases covered by the court's opinion it had been found that the supervisors involved participated for management in the adjustment of grievances. *I. B. E. W. Local 134 (Illinois Bell Tel. Co.),* 192 NLRB No. 17, slip op. p. 5, n. 5; *I. B. E. W. System Council U-4 (Florida Power & Light Co.),* 193 NLRB 30, 33. The basis for the court's decision was that the union fines were imposed for conduct performed outside the scope of the

members' supervisory functions. While the court repeated the quoted caveat from the Safeway case, it is not clear from the later opinion whether the court would have sustained a fine against a statutory supervisor for performing supervisory functions if he did not represent management in collective bargaining or in the adjustment of grievances.

Like the District of Columbia Circuit, the Ninth Circuit has held that a union may lawfully fine a supervisor for performing rank-and-file work during a strike. *N. L. R. B. (California Newspapers, Inc.) v. Typographical Union Local 21,* F. 2d , 83 LRRM 2314. However, in the *California Newspapers* case the court sustained a Board holding that the union violated Section 8(b)(1)(B) by fining a member because he fired an employee. Although the court and the Board appear to have considered only the "supervisory" status of the persons involved, it had been found specifically that they had authority to adjust grievances. 192 NLRB No. 71, TXD slip op. p. 2; 193 NLRB 310, 322, 323.

The Seventh Circuit, expressly disagreeing with the District of Columbia Circuit, has held that a union may not fine management representatives for performing rank-and-file work during a strike. *N. L. R. B. (Wisconsin Electric Power Co.) v. I. B. E. W. Local 2150,* F. 2d , 83 LRRM 2827. However, that decision is not authority on the delineation of the management representatives protected by Section 8(b)(1)(B) because it was there found as a fact that "the concededly statutory supervisors [involved] possessed the authority to adjust grievances," within the express scope of Section 8(b)(1)(B). 192 NLRB No. 16, slip op. p. 4.

In any event, whatever the views of the Courts of Appeals are, under Board decisions, by which I am bound, a union violates Section 8(b)(1)(B) by disciplining any supervisor for

work-related action taken by him. It is admitted that Jones was a supervisor. It is further clear, under the terms of the collective-bargaining agreement in the record, that he was properly acting in his capacity as conductor in recommending the discharge of four musicians and the probation of a fifth. Accordingly, I find and conclude that Respondent violated Section 8(b)(1)(B) by taking disciplinary measures against Jones.[12]

CONCLUSIONS OF LAW

1. Rochester Civic Music Association, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By disciplining Dr. Samuel Jones, conductor of the Rochester Philharmonic Orchestra, for having recommended that four musicians be discharged and that one musician be placed on probation, Respondent Union coerced and restrained the Employer in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances and thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[12] It might be held on the basis of the collective-bargaining agreement alone that Jones was a representative of management "in administering the collective-bargaining agreement" within the scope of the District of Columbia Circuit's holding in *Safeway Stores, supra,* 458 F. 2d at 798, n. 12.

THE REMEDY

The admitted facts in the present case present a classic example of the grossest form of coercion against which the statutory provision was directed. That the conductor of a symphony orchestra must be accorded considerable freedom to exercise his artistic and professional judgment as to the competence of orchestra members is clearly recognized in the collective-bargaining agreement. For the Union to prefer charges and impose severe penalties for the conductor's performance of his duties manifestly interfers with the right of management to a conductor of artistic integrity uncompromised by any actual or potential conflicts. The possibility of explusion or suspension from union membership, creating a serious threat to a musician's economic survival, would of necessity constitute a serious threat of a substantial conflict of interest.

In its post-trial letter-memorandum, Respondent asserts that Jones "has not suffered" by reason of the Union's action because he "has in fact obtained employment elsewhere" and his "fine was paid apparently by someone other than Dr. Jones." If we assume the truth of these factual representations,[13] and if we further assume that Jones' change of position was his free choice, uninfluenced by his difficulty

[13] While this Decision was in the process of final typing, a letter was received from the Charging Party's counsel and then, the next day, a rejoinder from Respondent's counsel. Both letters, like Respondent's counsel's original letter-memorandum, improperly contain statements of alleged facts not appearing on the record. Additionally, they contain unseemly and unprofessional remarks. Although I have read these letters, I have given them no consideration in reaching this Decision. In no sense are they to be considered part of the record in this proceeding. Cf. Sec. 102.45 (b) of the Board's Regulations. The filing of such documents is not permitted and is to be strongly discouraged.

with Respondent Union, the gravity of the violation here found is not mitigated. As the Board recently said in *American Federation of Musicians Local 76 (John C. Wakely)*, 202 NLRB No. 80, slip op. p. 2:[14]

> . . . It is also well established that in determining whether an 8(b)(1)(B) violation has been committed, the answer does not turn on whether the coercion succeeded or failed. The test is whether it may reasonably be said that the respondent's action meaningfully detracted from the undivided loyalty owed by the supervisor to his employer and if such action thereby interfered with management's right to select its representative. [footnote omitted]

The fact that Respondent eventually (after the charge was filed) rescinded the suspension from membership and substantially reduced the fine does not obviate the need for a remedial order. Indeed, the mere bringing of the intra-union charges, without the imposition of any penalties, warrants the issuance of a remedial order. *I. B. E. W. Local 2150 (Wisconsin Electric Power Co.), supra,* 192 NLRB No. 16, n. 3, enf'd., F. 2d , 83 LRRM 2827; *Sheet Metal Workers Local 71 (H. J. Otten Co.),* 193 NLRB 23, 26-27.

And if it is a fact, as stated in Respondent's post-trial memorandum, that Jones' fine has been paid, vindication of the statutory policy requires that the amount so paid be refunded, with interest at 6 percent per annum. *The Newspaper Guild (Times Publishing Co.), supra,* 196 NLRB No. 159. This

[14] Respondent cites the *Wakely* decision in support of its contention that no order is warranted in the present case. However, the two cases are totally different. In *Wakely,* the respondent union had voluntarily withdrawn its violative threat and, as said by the Board, "there [was] no suggestion . . . that the action . . . was even intended to be directed against a supervisor."

conclusion as to the proper remedial action is not altered by the alleged fact that somebody other than Jones paid the fine.[15]

Nor is the result here reached affected by the fact, emphasized by Respondent, that the Employer did not file a charge against Respondent and did not formally appear in the present proceeding. Jones' charge was sufficient to set the administrative machinery in motion. Once the proceeding was instituted, vindication of the public interest was possible and necessary.[16] *N. L. R. B. v. Indiana & Michigan Elec. Co.*, 318 U. S. 9, 17-18.

Accordingly, I reject Respondent's contention that the unfair labor practice here found is so unsubstantial as not to warrant issuance of an order. I shall, therefore, recommend issuance of an order customary in such cases, including refund, with interest, of any amount of the fine paid by or on behalf of Jones.

The Charging Party recommends a remedial order somewhat stronger than the usual one in such cases. The Charging Party's brief says:

> . . .[I]n light of the notoriety given the disciplining of Dr. Jones by Respondent and in light of fact that appearances as a guest conductor in various parts of the country are an integral part of Dr. Jones' occupation as a conductor in conjunction with other symphony orchestras, it is requested that Respondent be ordered to also publish such notice in the monthly official journal

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[15] It may be a reasonable conjecture that the fine was paid by the Employer, which was perhaps most threatened and adversely affected by the Union's conduct.

[16] It may be noted that the Employer had previously sought and obtained an advisory opinion from the Board concerning the jurisdictional issue.

of the American Federation of Musicians, The *International Musician.*

Although there is no record evidence of any "notoriety" given the Union's conduct in this case, I can take official notice of the peripatetic nature of a symphony orchestra conductor's career. Because of this, I believe it appropriate that reasonable steps be taken to inform interested persons generally that Jones is not *persona non grata* with Respondent. Such "interested persons" would obviously include members of other locals of the American Federation of Musicians, even though Rochester Musicians Association Local 66 is the only respondent in the present proceeding. Accordingly, I shall adopt the Charging Party's suggestion and order Respondent to have the notice published in *The International Musician,* even if that can be accomplished only through a paid advertisement. *Cf. I. B. E. W. Local 3 (Diesel Construction),* 205 NLRB No. 51.

Finally, although I deem Respondent's conduct to be seriously coercive, I shall not recommend a broad cease-and-desist order in view of the fact that, as discussed herein, Respondent took its violative action at a time when it reasonably believed it was subject to the Board's jurisdiction.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[17]

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[17] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent Rochester Musicians Association Local 66, affiliated with the American Federation of Musicians, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing the Rochester Civic Music Association, Inc., in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by trying or disciplining such representatives.

(b) In any like or related manner restraining or coercing the Rochester Civic Music Association, Inc., in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Expunge all record of the disciplinary proceedings and action taken against Dr. Samuel Jones.

(b) Rescind any and all fines levied against Dr. Samuel Jones and refund to him any money paid to Respondent by or on behalf of Dr. Samuel Jones as a result of any such fine, together with interest at the rate of 6 percent per annum.

(c) Notify Dr. Samuel Jones, in writing, that it has taken the aforesaid remedial action and will in the future comply with the cease-and-desist provisions of this Order.

(d) Cause to be published the complete text of the attached notice marked "Appendix" in a conspicuous place in the official monthly journal of the American Federation of Musicians, *The International Musician,* and post copies of said notice in conspicuous places in its business offices, meeting

place and all places where notices to members are customarily posted. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Mail to the Regional Director for Region 3 signed copies of said notice for posting by the Rochester Civic Music Association, Inc., if willing, in places where notices to employees are customarily posted. Copies of said notices, on forms furnished by the Regional Director for Region 3, shall, after being duly signed by a representative of Respondent, be forthwith returned to the Regional Director.

(f) Notify the Regional Director for Region 3, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.[18]

IT IS FURTHER ORDERED THAT the General Counsel's Motion to Strike Affirmative Defenses to Respondent's Answer is DENIED.

Dated at Washington, D. C. Aug. 22, 1973.

JOSEPHINE H. KLEIN,
Josephine H. Klein,
Administrative Law Judge.

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[18] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix Attached to Decision.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE AND WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

WE WILL NOT bring charges, try, fine, or otherwise discipline the conductor or other supervisory employees of the ROCHESTER PHILHARMONIC ORCHESTRA or the ROCHESTER CIVIC MUSIC ASSOCIATION, INC., for conduct or acts performed by them in the course of their employment.

WE WILL NOT in any like or related manner restrain or coerce the ROCHESTER PHILHARMONIC ORCHESTRA or the ROCHESTER CIVIC MUSIC ASSOCIATION, INC., in the selection of their representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL expunge from our records all references to any charges, trials, fines or other disciplinary action action against Dr. Samuel Jones for personnel action taken or recommended by him as conductor or the ROCHESTER PHILHARMONIC ORCHESTRA.

WE WILL rescind any fines levied against Dr. Samuel Jones for personnel action taken or recommended by him as conductor of the ROCHESTER PHILHARMONIC ORCHESTRA, and WE WILL refund to him (with interest at the rate of 6 percent per annum) any money that may have been paid to us by him or on his behalf as a result of any such fine.

ROCHESTER MUSICIANS ASSOCIATION
LOCAL 66 affiliated with THE
AMERICAN FEDERATION OF
MUSICIANS,
(Labor Organization).

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9th Floor, Federal Building, 111 W. Huron Street, Buffalo, N. Y. 14202 (Tel. No. 716-842-3100).

Decision and Order.

UNITED STATES OF AMERICA
Before the
NATIONAL LABOR RELATIONS BOARD

ROCHESTER MUSICIANS ASSOCIATION LOCAL 66 AFFILIATED WITH THE AMERICAN FEDERATION OF MUSICIANS (CIVIC MUSIC ASSOCIATION),

and

DR. SAMUEL JONES.

Case 3—CB—1939

On August 22, 1973, Administrative Law Judge Josephine H. Klein issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.

General Counsel's Exhibit 1(a).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Rochester Musicians Association Local 66 affiliated with the American Federation of Musicians, Rochester, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated, Washington, D. C. Nov. 29, 1973.

HOWARD JENKINS, JR., *Member,*
RALPH E. KENNEDY, *Member,*
JOHN A. PENELLO, *Member,*
(Seal) NATIONAL LABOR RELATIONS BOARD.

General Counsel's Exhibit 1(a)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

General Counsel's Exhibit 1(a).

DO NOT WRITE IN THIS SPACE

Case No. 3-CB-1939
Date Filed August 28, 1972

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name American Federation of Musicians of the United States and Canada and the Amer. Fed. of Mus., Rochester Mus. Assn., Local No. 66

b. Union Representative to Contact Joseph T. DeVitt

c. Phone No. 546-7633

d. Address (Street, city, State and ZIP code) 83 Clinton Avenue North, Rochester, New York

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (List Subsections) (1) (B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.) Since on or about August 21, 1972, and at all times thereafter, the American Federation of Musicians and Local No. 66 of the American Federation of Musicians by its officers, agents and representatives have restrained or coerced an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

3. Name of Employer Civic Music Association

General Counsel's Exhibit 1(a).

4. Location of Plant Involved (Street, city, State and ZIP code) 60 Gibbs Street, Rochester, New York 14604

5. Type of Establishment (Factory, mine, wholesaler, etc.) Symphonic Orchestra

6. Identify Principal Product or Service Symphonic Orchestra

7. No. of Workers Employed 100

8. Full Name of Party Filing Charge Dr. Samuel Jones

9. Address of Party Filing Charge (Street, city, State and ZIP code) 153 Tobey Road, Pittsford, New York 14534

10. Telephone No. 381-7232

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: JOHN B. McCRORY
(Signature of representative or person making charge)
Attorney
(Title or office, if any)
Address One Exchange Street
Rochester, New York 14603
546-8000
(Telephone number)
August 23, 1972
(Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

General Counsel's Exhibit 2

* * *

34. Members of the Orchestra shall be engaged or discharged only by the General Manager of the Association, or by another officer of the Association, subject to the limitations imposed by the terms of this contract as follows:

RENEWAL OF INDIVIDUAL CONTRACTS OR RELEASE OF INDIVIDUAL MUSICIANS FROM ORCHESTRA PERSONNEL FOR FOLLOWING SEASON

* * *

37. Each regular member of the Orchestra who has been engaged for more than one (1) season shall be notified of the Association's intention to release him on or before February 1. On said date the General Manager will submit to the Union and the members involved all such requests that have been made by the conductor and/or music adviser and/or Association for changes in personnel, together with the conductor's and/or music adviser's and/or Association's and the personnel manager's observations. In such event the effective date of the release shall be the end of the following season; provided, however, said member shall give notice by April 1 of his intentions concerning participation in the following season.

General Counsel's Exhibit 3

ROCHESTER
(Seal)
MUSICIANS
ASSOCIATION
Local No. 66 A. F. of M.
Chartered Oct. 26, 1897

83 Clinton Avenue North Rochester, New York 14604
(716) 546-7633

JOSEPH T. DE VITT, *President*
JOSEPH BENEDETTO, *Vice President*
CHARLES LA CAVA, *Secretary*

February 24, 1972

Dr. Samuel Jones
153 Tobey Road
Pittsford, New York 14534

Dear Mr. Jones:

Please be advised that certain charges have been lodged with the Board of Directors against you alleging that you have engaged in activities which violate the Constitution, By-Laws and Rules of the Rochester Musicians Association, Inc., Local 66 A. F. of M. as follows:

1. On or about the 22nd day of September, 1969, while a lawful strike by this Union against the Civic Music Association of Rochester, Inc. was in progress, and a picket line was present, you did engage in anti-union activities in that you did cross that picket line, entered the rehearsal hall and announced yourself prepared to conduct a rehearsal of the Rochester Philharmonic Orchestra in violation of the strike resolution and picket line, in violation of Article II of the Constitution of this Union.

General Counsel's Exhibit 3.

2. On or about the 27th day of January, 1972, you made a recommendation to the Civic Music Association that the contracts of Hrant Tatian, Richard F. Jones, Robert Taylor and Abraham Weiss not be renewed at the conclusion of the 1972-73 season and that Morris Secon be placed on probation, all based upon your judgment that these musicians are performing at a level below the quality you have a right to expect. You took this action in violation of Article V BB. 7. (b) requiring review by a committee of the Union.

3. You are hereby charged with cooperating with the employer, the Civic Music Association of Rochester, Inc. in a plan to discharge Hrant Tatian, Richard F. Jones, Robert Taylor, Abraham Weiss and Morris Secon because of their union activities, in violation of Article II of the Constitution of this Union.

4. You are further charged with interfering with the president of this Union in the performance of his duties in that on January 29, 1972, at Nazareth College you attempted to prevent Joseph DeVitt, president of this Union, from speaking to the members of the orchestra and created a disturbance calculated to prevent Mr. DeVitt from being heard by the union members, and participating in a threat to have Mr. DeVitt forcibly ejected from the Nazareth College premises while in the performance of his duties as president and business agent of the Union.

5. You are further charged with activities calculated to defeat the principles of unionism with respect to our Union by publicly stating that the aforesaid five members of the Philharmonic Orchestra are incompetent musically, thereby bringing upon them public disgrace contrary to the tenets and objectives of this Union.

General Counsel's Exhibit 3.

You are therefore hereby required to appear before the Board of Directors of this Union at a regular meeting of the Board of Directors to be held on Monday, March 6, 1972 at 7:30 P. M. at the offices of the Union, 83 Clinton Avenue North, Rochester, New York, at which time a hearing will be held on the foregoing charges.

You may bring with you any documentation, evidence or witnesses that you may wish to submit in answer to these charges, and you may appear with and be represented by an attorney.

Please be further advised that if one or more of the foregoing charges are substantiated, the Board is empowered to find you in violation and to impose a fine, or a suspension or revocation of your membership in this Union, or both.

Very truly yours,

ROCHESTER MUSICIANS
ASSOCIATION
JOSEPH T. DeVITT,
Joseph T. DeVitt,
President

General Counsel's Exhibit 4

ROCHESTER
(Seal)
MUSICIANS
ASSOCIATION
Local No. 66 A. F. of M.
Chartered Oct. 26, 1897

83 Clinton Avenue North Rochester, New York 14604
(716) 546-7633

October 27, 1972

Dr. Samuel Jones
153 Tobey Road
Pittsford, New York 14534

Dear Dr. Jones:

At a duly scheduled meeting of the Executive Board of the Rochester Musicians Association, Local No. 66 A. F. of M., the Board considered the charges made against you contained in a letter dated February 24, 1972 addressed to you. It also reviewed the proceedings had since the filing of those charges.

In making that review, the Board found the following:

Following the sending of the February 24, 1972 letter containing the aforesaid charges, you requested that you be permitted to appear with an attorney. On March 6, 1972 a hearing was scheduled and commenced at which you were present, represented by your counsel. At the request of your counsel, the hearing was adjourned to April 11, 1972. Your

counsel requested that written copies of the formal charges be furnished to you, which was done. Since that time, the Union has been unsuccessful in its attempts to convene another hearing because the attorneys it is claimed were not able to arrive at a mutually satisfactory date for resuming the hearing. By letter dated July 17, 1972 you were given 15 days in which to reply in writing to the charges filed against you. Your response to that notice was a letter from your attorney dated August 14, 1972 addressed to the Union's attorney, simply denying the charges. There was no factual statement or claim, no affidavits and no attempt to refute the factual statements contained in the written charge filed with the Union, copies of which your attorney insisted upon having. The so-called answer contained in the letter dated August 14, 1972 was not made or signed by you, but was a letter signed by your attorney.

It was the conclusion of the Board that you have engaged in delaying tactics, that you have refused to cooperate with the Board either in the scheduling of the hearing or in responding to the request that you file an answer in writing.

In the meantime, you have made public statements in which you have affirmed the actions which you took which are the basis of the charges filed against you. The Board has reviewed all of the written evidence and the statements made publicly by you relative to the actions which you took and which are the basis of the charges contained in the letter of February 24, 1972 and have made the following findings:

A. CHARGE NUMBER ONE:

On October 6, 1969 you appeared before the Executive Board at a meeting. You admitted at that time that you appeared at the Eastman Theatre ready to conduct a rehearsal

General Counsel's Exhibit 4.

of the Rochester Philharmonic Orchestra at a time when you were aware of the fact that the Union was on strike, that there was a picket line in front of the Eastman Theater (which you crossed), that picketing had been going on for several weeks, and that the Civic Music Association had been placed on the unfair list. You admitted that you were told by the Union not to show up for the rehearsal. All of the foregoing had been publicized on television, which had shown pictures of the pickets in front of the Eastman Theatre, by the newspapers which carried pictures and articles about the picketing and the unfair listing of the Civic Music Association by the Union and concerning the controversy between the Civic Music Association and the Rochester Musicians Association generally. You permitted the newspapers to take a picture of you and publish the same, showing you standing by the window of the Eastman Theatre rehearsal hall waiting to conduct the orchestra on that day. Based upon all the foregoing and upon your admissions, the Board unanimously resolved that you were guilty of Charge Number One.

B. CHARGE NUMBER TWO:

You have publicly acknowledged that you recommended that Hrant Tatian, Richard F. Jones, Robert Taylor and Abraham Wise be dismissed from the orchestra and that Morris Secon be put on probation. You have publicly stated that you recommended their dismissal on the grounds that they were performing at a level below the quality "I have a right to expect". This is a judgment of competency and is in direct violation of Article V B. B. 7 (b) of our constitution and by-laws requiring review by a Committee of the Union. Based on your own admissions and statements, the Board unanimously resolved that you were guilty of Charge Number Two.

General Counsel's Exhibit 4.

C. CHARGE NUMBER THREE:

Hrant Tatian was a former member of the orchestra negotiating committee in its negotiations with the Civic Music Association relative to a contract for employment. Richard Jones and Robert Taylor are presently members of that negotiating committee. Abraham Wise and Morris Secon had been outspoken critics of the Civic Music Association's conduct of its musical affairs. You have publicly and repeatedly stated that you are the agent of the employer in its dealings with the orchestra members. This, coupled with your recommendation for dismissal of five men who were actively engaged in Union activities, is considered by the Board to be anti-Union activity. The Board unanimously adopted a resolution finding you guilty of Charge Number Three.

D. CHARGE NUMBER FOUR:

The occurrence which is the basis of Charge Number Four occurred in the presence of the entire Philharmonic Orchestra. Joseph DeVitt, President of this Union, called a meeting of the Rochester Philharmonic Orchestra on January 29, 1972 at the Nazareth Arts College, said meeting to take place one-half hour before the scheduled time for rehearsal of the orchestra. You were notified of the calling of that meeting. You, in the presence of the entire orchestra, Mr. DeVitt and Mr. Nicholas Jones, Manager of the Civic Music Association, objected to Mr. DeVitt's presence, stating that "outsiders were not permitted at rehearsals". While Mr. DeVitt was attempting to address the orchestra, before the rehearsal was scheduled to start, you removed a copy of the Union—Civic Music Association contract from your brief case and in the presence of the orchestra, Mr. DeVitt and Mr. Jones, read in a loud voice from that contract, causing a

disruption of the meeting and making it impossible for Mr. DeVitt to make himself heard to the orchestra members. You participated in an attempt to have Mr. DeVitt evicted from the premises by the caretaker. Based upon these facts the Board adopted a resolution finding you guilty of Charge Number Four.

E. CHARGE NUMBER FIVE:

With respect to Charge Number Five, the Board found the following facts: You have publicly admitted and acknowledged that it was you who made the recommendations for the dismissal of the five musicians heretofore referred to. You did publicly on February 16, 1972 make a statement in which you said "There was no reason to consult the orchestra committee before the firings. It's not in the Union contract and would have served no purpose." In recommending these five musicians for discharge, you in fact questioned their competency and in fact concluded, contrary to the requirements of our constitution and by-laws, that the question of competency did not have to be submitted to a committee as aforesaid. In making public statements and trying the issues in the public media, you have not only violated the constitution and by-laws of the Union, but have brought disgrace and grevious mental harm upon the five discharged musicians, all in violation of your obligations as a member of this Union. Based upon the foregoing facts, the Board adopted a resolution finding you guilty of Charge Number Five.

The Board thereupon considered the penalty to be imposed upon you, based upon the finding of guilty of the foregoing five charges. The Board thereupon unanimously adopted a resolution suspending you from membership in this Union for a period of six months from the date of notification and imposed fines totaling $1,000.00.

General Counsel's Exhibit 4.

On October 16, 1972, a meeting of the Executive Board of the Rochester Musicians Association, Local No. 66 A. F. of M. was held, at which meeting the Board reviewed its action taken at the prior meeting of August 21, 1972. A review was had of the facts hereinbefore recited, whereupon a resolution was adopted affirming the findings of guilty on the five charges, but rescinding the six months' suspension and reducing the fine to $50.00 on each charge for a total of $250.00.

Based upon this unanimous action of the Executive Board of the Rochester Musicians Association, Local No. 66 A. F. of M., you are hereby formally notified that you have been found guilty on each of the five charges heretobefore filed against you, of which you have had notice, and that you are hereby fined the sum of $50.00 on each charge for a total of $250.00.

Please be further notified that under the constitution and by-laws of our Union, it is mandatory that you pay this fine within ten days from the date of receipt by you of this notice. Please be further advised that upon your failure to pay these fines, or any one of them, the Board will be compelled to invoke the sanction of suspension from membership as provided by the constitution and by-laws of this Union.

Very truly yours,

ROCHESTER MUSICIANS
ASSOCIATION
CHARLES LaCAVA
Charles LaCava, Secretary

Copy: Nixon, Hargrave, Devans & Doyle
Attention: John B. McCrory, Esq.

Salzman, Salzman and Lipson
Attention: Sidney J. Salzman, Esq.

Stenographic Transcript of Testimony at Hearing of July 10, 1973.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Third Region

In the Matter of:

ROCHESTER MUSICIANS ASSOCIATION LOCAL 66, AFFILIATED WITH THE AMERICAN FEDERATION OF MUSICIANS (CIVIC MUSIC ASSOCIATION)

and

DR. SAMUEL JONES.

Case No. 3-CB-1939

Federal Building,
100 State Street
Rochester, New York
Tuesday, July 10, 1973

The above-entitled matter came on for Hearing, pursuant to Notice, at 10:00 o'clock, a.m.

Before:

The Honorable Judge Josephine H. Klein, Administrative Law Judge.

Appearances:

Sidney J. Salzman, Esq., Salzman, Salzman and Lipson, 600 Executive Office Building, 36 Main Street West, Rochester, New York 14614, Appearing on behalf of Respondent.

Stenographic Transcript of Testimony at Hearing of July 10, 1973.

John B. McCrory, Esq., Nixon Hargrave, Devans & Doyle, Lincoln First Tower, Rochester, New York 14603, Appearing on behalf of Petitioner.

Francis J. Novak, Jr., Appearing as Counsel for General Counsel.

[3] PROCEEDINGS.

Judge Klein: The Hearing will be in order.

This is a formal Hearing before the National Labor Relations Board, in the matter of Rochester Musicians Association, Local 66, Affiliated with the American Federation of Musicians (Civic Music Association), Case No. 3-CB-1939.

The Administrative Law Judge hearing this case is Josephine H. Klein.

Now, if Counsel would briefly state their appearances for the record without their address. Mr. Novak?

Mr. Novak: Francis J. Novak, Jr., Counsel for General Counsel.

Mr. Salzman: Sidney J. Salzman for the Union.

Mr. McCrory: John B. McCrory, Counsel for the Charging Party.

Judge Klein: Gentlemen, you have to talk louder. In this position I have a difficulty.

Mr. Novak, would you like to introduce the formal papers?

Mr. Novak: I offer into evidence the formal papers. They have been marked General Counsel's Exhibits 1(a) through 1(l) inclusive, and Mr. Salzman and Mr. McCrory have seen copies of this Exhibit.

(Whereupon, the document above-referred to was marked General Counsel's Exhibits 1(a) through 1(l) inclusive for identification.)

[4] Judge Klein: I expect there are no objections?

Mr. Salzman: No objection.

Mr. McCrory: No objection.

Judge Klein: It is received.

(Whereupon, the document above-referred to heretofore marked General Counsel's Exhibits 1(a) through 1(l) were received in evidence.)

Mr. McCrory, in the course of this Hearing you will always follow Mr. Novak.

Mr. McCrory: Thank you.

Judge Klein: I think, Mr. Novak, you had better give us a little opening statement. See if you can outline briefly the issues, factual and legal.

Mr. Novak: Factual and legal. Your Honor, this case presents the—

Judge Klein: Mr. Novak, shout.

Mr. Novak: Your Honor, this case presents the typical and traditional example of the supervisor acting in his management capacity. Dr. Jones, the Charging Party, was the conductor of the Rochester Philharmonic Orchestra. On or about January 27, pursuant to the collective bargaining agreement—

Judge Klein: That's '72?

Mr. McCrory: January 27, 1972.

Mr. Novak: Dr. Jones was asked and requested by the [5] Civil Musicians Association to evaluate the performance of all musicians in the orchestra. He did do such and recommended that four musicians' contracts be not renewed for the following season and also that one musician's contract not be renewed at the end of the season. This musician did not have tenure and according to the contract, he could be dismissed on the end of the season. As a result of this, Dr. Jones received a letter from the union dated February 24th—He

received it on or about February 28th—bringing him up on charges for recommending the dismissal of the five musicians.

On March the 6th, Dr. Jones was called to a trial of the union Executive Committee over his recommendation to dismiss the five musicians. At the trial, he was served with some additional charges. Mr. McCrory, Mr. Jones' attorney at this time, asked for an adjournment to answer these charges. On August 21st 1972—

Judge Klein: He asked for it. Did he get it?

Mr. Novak: Yes, he did.

On August 21, 1972, Dr. Jones was tried *in abstentia* and was expelled from membership in the union for six months and fined $1,000. As a sideline to this, Dr. Jones discovered the fine and the expulsion in the newspaper. He had no notice of it.

On or about October 16, 1972, the respondent union reconsidered its action and rescinded the six month suspension [6] and reduced the fine from $1,000 to $250.

Judge Klein: Reconsidered it on its own motion?

Mr. Novak: Just on its own.

I believe the issue presented by the Respondent was the fact that Dr. Jones filed a prior charge in Case No. 3-CD-1828 over the February 24th letter of the union bringing him up on charges. At this time, the Board was not exercising jurisdiction over Symphony Orchestras and the Regional Director dismissed it on policy determination in this matter.

Subsequently the Board on August 19, 1972 gave Notice in the Federal Register that it was considering promulgation of a rule to consider Board jurisdiction to cover Symphony Orchestras.

The present charge was filed on August 28, 1972. On March 2, 1973, the Board issued a rule asserting jurisdiction in any

proceeding arising under Section 819 of the Act arising from Symphony Orchestras having a gross revenue of not less than one million dollars. The rule, effective March, 1973, was published in the Federal Register and applied to all proceedings pending at that time or which may arise thereafter. The present labor charge was pending. The Regional Director determined the charge had merit and we issued the complaint.

Judge Klein: Mr. McCrory, do you have anything you want to add?

[7] Mr. McCrory: No, I think that is a reasonably fair statement.

Judge Klein: Now, Mr. Salzman, I would ask that you limit yourself, if you would, to points of disagreement, factual or legal.

Mr. Salzman: Yes. Specifically, the union position is that the original charge filed by Dr. Jones back on March 20, 1972 was based upon the same factual situation upon the present August 28th charges were filed, and that it is, in fact, a rehashing of the same issues that were previously determined by the Board when it indicated that it did not and would not assert jurisdiction, and subsequently on August 9, 1972, notified Dr. Jones and his attorney that an appeal which they had taken—

Judge Klein: I have read the papers. Let me ask you, have you checked and do you have any authority on the proposition of whether *res judicata* or collateral estoppel does apply in a situation of a discretionary denial? The Board's rule was never anything other than a discretionary extention. Does the principle apply to this situation?

Mr. Salzman: I can not say as far as any specific authority at this time. It is our expectation we will submit a memorandum of law. I think the principle which is applied here is

basically the rulemaking power and procedure of the Board is, in fact, a legislative power and procedure, and [8] when it first asserted that it had no jurisdiction because there was no rule covering it, they had not adopted any rules covering it up to that point.

Judge Klein: Excuse me. That was not the original basis for declining jurisdiction, was it? I thought it was just discretionary, we think we are going to assert our power.

Mr. Salzman: They had not adopted any rule indicating they were asserting authority. Subsequently—

Judge Klein: What I mean is they were always statutorily able to assert jurisdiction?

Mr. Salzman: Only if they have properly adopted a rule.

Judge Klein: Do you have any authority for that?

Mr. Salzman: I can not sight any at the moment.

Judge Klein: The Board does not need a rule to assert its statutory jurisdiction. It may probably advisably should adopt a rule to deny it, but in any event—

Mr. Salzman: Well, that is our legal position. And we feel, under the circumstances, when they finally adopt the rule which they promulgated indicating they would assert jurisdiction hence forth, that in fact, they were attempting to exert *ex post facto,* a rule to an incident or event that had occurred long before.

Judge Klein: You are not putting this on constitutional grounds by using *ex post facto,* are you?

[9] Mr. Salzman: I put on it any grounds that it leads to. I think we do have a question of *ex post facto.*

As far as *res judicata,* that applies here, I think. There was to be some finalization of an event or action taken by the Board arising out of a series of events. It seems to me when they go through the procedure of investigating a charge as to

whether or not they assert jurisdiction, make a ruling that they do not assert jurisdiction, and then there is an appeal from that rule, and subsequently a denial of the appeal over a period of time, that denial coming out on August 9, 1972, it seems to me that the Board can not then at a later date besides that the action that they took in the previous determination can now be reversed by their own action and assert jurisdiction.

Judge Klein: Now we are right back to the initial question I asked you.

Mr. Salzman: I feel *res judicata* does apply under these circumstances.

Judge Klein: As I understand it, in the prior case there was no complaint, simply a charge?

Mr. Salzman: There was a charge, no complaint.

Judge Klein: It was dismissed by the Regional Office?

Mr. Salzman: Based upon the same set of facts on which this present charge is filed. Just to finish on the factual situation, Counsel has omitted some intermediate [10] steps that occurred. There was a petition in April, 1972 for a advisory opinion to the Board. And in response to that, there was an advisory opinion issued on July 31, 1972 by the Board which indicated they were not asserting jurisdiction.

Judge Klein: That is in connection with this orchestra. Who filed the petition?

Mr. Novak: Your Honor, those facts, they are all in my motion to strike the affirmative defense.

Judge Klein: All right. That was filed by the Charging Party.

Mr. Salzman: In other words, we are proceeding on two courses here. One, they filed an appeal from the original ruling, and the other proceeding by petition for an advisory

opinion. And in both instances the Board denied jurisdiction. Now, in the interum between the time of the denial of the appeal and the denial of jurisdiction by the Board, the union, proceeding on the theory that there was no jurisdiction as far as the Board was concerned, proceeded to attempt to dispose of the matter that was pending for the union at that time. And without getting involved in a great deal of controversy about why the trial finally was held in abstentia, there was considerable difficulty in bringing all the parties together for a hearing. The initial application for adjournment was made at the return date. There was no indication prior to that return date that there was going to be an application for adjournment. A steno- [11] grapher was provided.

Judge Klein: Do I understand that the conducting of that hearing or any irregularities at that union proceeding are in issue? There is no charge against the union that it was unfair or arbitrary in any way.

Mr. Salzman: Your Honor, I am only responding.

Judge Klein: I want to narrow this down to what we have.

Mr. Salzman: And evidence by Counsel is he was tried *in abstentia.*

Judge Klein: Lawyers forget when there is no jury present.

Mr. McCroy: There was something terribly unfair, but it is not an issue for your consideration.

Mr. Salzman: For the record, we dispute that. It was not unfair.

Judge Klein: I am not getting into that, so proceed.

Mr. Salzman: Sometimes when defendants do not show up for trial, they are found guilty.

Mr. McCrory: Even the union's lawyers did not show up for it.

Judge Klein: Gentlemen, let's not engage in pleasantry at this point.

Mr. Salzman: So that acting with the reliance that the Board, after several rulings have no jurisdiction, the [12] union proceeded to dispose of the matter within the union's walls, shall we say.

Judge Klein: Your present statement and the way you worded it, does that mean you are claiming some form of estoppel?

Mr. Salzman: More like entrapment. We think we can produce some law on that point.

Judge Klein: I assume there is some factual dispute as to whether the union acted in reliance on the Board ruling?

Mr. Novak: I think that is immaterial.

Judge Klein: You are not going to deny they held a trial relying in no jurisdiction by the Board?

Mr. Novak: No. I would not dispute that.

Judge Klein: Alright.

Mr. Salzman: Now, the Counsel referred to the fact that when the Board finally asserted jurisdiction it then was able to proceed in connection with this matter because there was a charge pending. Well, as a matter of fact, it was not then pending because the Board had indicated previously on the various occasions that it had no jurisdiction, and there was no charge pending, eventually, by the fact that a new charge was filed after the jurisdiction was asserted.

Judge Klein: I see the second charge was filed after the Board rule asserting jurisdiction.

Mr. Salzman: Yes. What I am saying is there was [13] nothing pending at that time, neither by charge nor by complaint.

Judge Klein: Any disagreement on that?

Mr. McCrory: Yes. The actual chronology, it appeared in the Federal Register on August 19th; the union trial was held on the 21st; and the charge filed by Dr. Jones was August 23rd, which was, apparently received by the Board in Buffalo on August 28th, although a copy of the charge was served on Mr. Levitt on August 24th by personal service. So that, there was there intervening National Labor Relations Board proposed rule, and secondly, the union trial of Dr. Jones *in abstentia,* and then the charge was filed, which was pending when the National Labor Relations Board ultimately took jurisdiction.

Mr. Novak: Your Honor, the charge was filed after the Board published Notice in the Federal Register that it was considering promulgation of the rule. So, the charge was filed and then the rule was made.

Mr. Salzman: Well, except that the appeal was finalized on August 9th indicating that there was no jurisdiction on August 9th, 1972. And this charge was then filed August 28th. My point being, there was nothing pending at the time the charge was filed.

Judge Klein: Mr. Salzman, would you like to give me a word or two of your views of the 10(b) question?

[14] Mr. Salzman: You have to tell me what that is, your Honor.

Judge Klein: Six months. The Statute of Limitations and that.

Mr. Salzman: Yes. The only action that occurred within six months from the time of the filing of the charge was the action of the union in rescinding the suspension and reducing the fine. Now, it is our position that that is not an action detrimental to this complaint but one in his favor.

Judge Klein: I would like to hear Mr. Novak.

Stenographic Transcript of Testimony at Hearing of July 10, 1973.

Mr. Novak: Mr. Salzman referred to the original charge. I am talking about ... I think that was 3-CB-1939. That is what I am directing myself to. It was filed on August 28th. Now, the dates, the material dates all occurred within six months prior to that charge. We had a Feburary 24, 1972 letter sent to Dr. Jones bringing him up on charges. That was received by Dr. Jones on or about February 28th. We have a March 6, 1972 trial of Dr. Jones, the Union, in effect, reaffirming the charges on March 6th. We have an August 24, 1972 date where he was tried and fined and suspended. We have an October 16, 1972 date when the fine was reduced. All these dates are within the six months Statute of Limitations, six months prior to August 28, 1972.

Judge Klein: What was the date of this charge that is before us?

[15] Mr. Novak: August 28, 1972.

Mr. McCrory: It was dated August 23, 1972 personally served on the union August 24th, received in Buffalo five days later, received August 28th according to the return receipt.

Mr. Novak: It is alleged as received February 28th in the Complaint.

Mr. Salzman: One can not by simply renumbering a case, make a new case out of it. The fact this case was filed on August 28, 1972 and bears a number different from the one filed out in March of 1972—

Judge Klein: Wouldn't you be worse off or more in the soup if you were to date this from your original charge? That gets them farther back.

Mr. Salzman: On the contrary, the Board having ruled it was not going to assert jurisdiction, it seems *res judicata* applies. This is almost in the nature of double jeopardy.

Judge Klein: Except this is not a criminal proceeding and there is no double jeopardy.

Mr. Salzman: In the orderly process of the National Labor Relations Board, this case was decided and then it was revived.

Mr. Novak: Paragraph 1 of the Complaint is admitted, Paragraphs 2(a) and 2(b) are admitted.

Judge Klein: Just a minute. May I have the Complaint?

Mr. Novak: In an off record discussion, Mr. Salzman [16] has agreed to stipulate to the facts outlined in Paragraph 2(c) of the Complaint.

Mr. Salzman: Yes.

Mr. Novak: I am asking your Honor to take administrative notice, with regards to Paragraph 3 of the Complaint, to take administrative notice of Title 29, Labor, Part 103—Other Rules, Subpart A—Jurisdictional Standards, Section 103.2, Symphony Orchestras, where the Board ruled to take jurisdiction over symphony orchestras having more than one million dollars of revenues.

Judge Klein: I will take administrative notice of that.

Mr. Novak: This goes back to March 7, 1973.

In paragraph 5 of the Complaint, Mr. Salzman has agreed to stipulate that at all times material herein, Dr. Jones has been employed by the Association in the position of Rochester Philharmonic Orchestra conductor and a supervisor. He will not stipulate that he has the authority to adjust grievances of employees. Everything alleged in that Paragraph 5, he will stipulate. Is that correct, Mr. Salzman?

Mr. Salzman: We are stipulating the first clause up to word "supervisor". Everything after that we are refusing to stipulate.

Stenographic Transcript of Testimony at Hearing of July 10, 1973.

Judge Klein: You do not admit he was an agent, although it is not relevant in this case?

[17] Mr. Salzman: Yes.

Judge Klein: You do not agree he is an agent of the orchestra?

Mr. Salzman: That is correct.

Mr. McCrory: We are prepared with testimony on that.

Mr. Novak: I believe that Mr. Salzman will stipulate to Paragraph 9 of the Complaint.

Judge Klein: Paragraph 9. Is that so, Mr. Salzman?

Mr. Salzman: Let me check my notes, please. We are prepared to stipulate the following: on or about January 7, 1972—omitting the next clause and continuing—Dr. Jones recommended that four musicians contracts not be renewed and one musician be placed on probation. We raise issue whether he made that recommendation pursuant to the collective bargaining agreement.

Judge Klein: I understand. Mr. Novak, do you propose to put on any evidence?

Mr. Novak: I will put in the collective bargaining agreement and the clause that is applicable.

Judge Klein: Can you stipulate the collective bargaining agreement into evidence or at least portions of it?

Mr. Novak: Mark this as GC2 for identification.

(Whereupon, the document above-referred to was marked General Counsels Exhibit 2 for identification.)

Judge Klein: Before you do, see if you can get [18] Mr. Salzman's agreement, otherwise you will have to wait until you have a witness on the stand.

Mr. Novak: Alright.

Mr. Salzman: Without my reading it, Counsel says this is an accurate copy, I will agree.

Judge Klein: You have no objection to him putting it into evidence?

Mr. Salzman: Thats right.

Judge Klein: It is received as GC2.

(Whereupon, the document above-referred heretofore General Counsel's Exhibit 2 was received in evidence.)

Mr. Novak: It is put in for Article 37.

Judge Klein: Mr. Novak, you will provide the second copy?

Mr. Novak: I have it right now.

Judge Klein: Mr. McCrory, I am not ignoring you. I assume you will agree with Mr. Novak, unless you say otherwise.

Mr. McCrory: I am not familiar with Labor Law. I am a trial lawyer. I find it difficult not to say anything but I will defer to him.

Mr. Novak: With regards to Paragraph 10, I believe we can stipulate that the union by a letter dated Feburary 24, 1972, received by Dr. Jones on February 28, 1972, brought up [19] Dr. Jones on charges. And we will let the exhibit stand for itself.

Judge Klein: I understood you to say that in your opening statement—and Mr. Salzman did not dispute that fact—they brought them up on charges. And I do not think those dates are in controversy. Lets go on.

Mr. McCrory: We are to put into evidence the letter of February 24th.

Judge Klein: All right. That can be stipulated in as General Counsel's Exhibit 3.

Mr. Novak: Mark this General Counsel's Exhibit 3.

(Whereupon, the document above-referred to was marked General Counsel's Exhibit 3 for identification.)

Judge Klein: It is received.

(Whereupon, the document above-referred heretofore marked General Counsel's Exhibit 3, was received in evidence.)

Mr. Novak: I amended the Complaint to include in Paragraph 10, March 6, 1972. This was the date the union scheduled for Dr. Jones' Trial, and it was outlined in the February 24th letter. Could we stipulate that the union at this time reaffirmed the charges outlined in the February 24th letter?

Judge Klein: Is that stipulated?

[20] Mr. Salzman: Yes, it is.

Judge Klein: The stipulation is received.

Mr. Novak: With regards to Paragraph 11, your Honor, I think we can stipulate on or about August 24, 1972, Dr. Jones was expelled by Respondent from membership for six months and fined $1,000.

Judge Klein: I understand. That is stipulated, is it not?

Mr. Salzman: Yes, that is stipulated.

Mr. Novak: Your Honor, we also have an October 27, 1972 letter from the union to Dr. Jones outlining what occurred during the August 24, 1972 meeting.

Judge Klein: Is there any objection to its receipt?

Mr. Salzman: No.

Mr. Novak: Mark this General Counsel's Exhibit 4.

(Whereupon, the document above-referred to was marked General Counsel's Exhibit 4 for identification.)

Judge Klein: That is received as General Counsel's Exhibit 4.

(Whereupon, the document above-referred heretofore marked General Counsel's Exhibit 4, was received in evidence.)

Mr. McCrory: For the record, I should say the copies that have been submitted have certain things underlined, which [21] I did that.

Judge Klein: I will be blind to anything underlined.

Mr. Novak: Paragraph 11 has been admitted already. And that is also the October 27, 1972 letter marking mention of the occurrence of October 16, 1972. Remainder of the Paragraph is on the legal conclusions.

Judge Klein: The rest of the paragraph?

Mr. Novak: Yes.

Judge Klein: So, as I see it, everything in the Complaint is admitted except—

Mr. McCrory: The latter part of Paragraph 5.

Judge Klein: The fact that Dr. Jones had the authority to adjust grievances. Now, Mr. Salzman, I am going to refer to the fact that whatever the courts have said about this, and two courts have said the Board is wrong on it, the Board's rule that I am bound by is that it does not matter whether he has the authority to adjust grievances or not. If he is a supervisor, that is it. As I said, that is the Board's law. I am bound by that. The Ninth Circuit and the District of Columbia Circuit, I think have reversed the Board on that ruling, or at least in some content. But I have to go under the Board's rule. It does not matter whether he had the authority to adjust grievances or not. If he is a supervisor, he is entitled to his complete freedom.

Mr. Salzman: Well, I do not know whether it would be [22] appropriate to offer testimony in regards to that matter for the record, or whether Counsel would care to stipulate that never before in the relationship between the Civic Musicians Association and Conductors or Conductors and the Civic Music Association has the conductor asserted that right. We want to offer that into the record.

Stenographic Transcript of Testimony at Hearing of July 10, 1973.

Judge Klein: Mr. Salzman, we will go off record and see if you can stipulate something. Before we go off record, I am telling you as a matter of law the position I am in. That is the law. So, I am not sure at this stage of the game whether I want to take evidence on it anyway because I could not decide the issue your way even if the evidence were overwhelming.

Off the record.

(Discussion off the record.)

Judge Klein: Back on the record.

Mr. Novak: General Counsel will stipulate that the procedure used by the union, the constitution and by-laws, to fine and expel Dr. Jones was proper. However, we will not concede it is material.

Mr. McCrory: I have to amend that stipulation, that there is no issue here as to whether it is proper or not.

Mr. Salzman: We will take both stipulations.

Judge Klein: Fine. They are both received.

Now, you had some exhibits which you had marked, which I [23] understand, Mr. Salzman, will be introduced without objection?

Mr. Salzman: Yes, your Honor. We have Respondent's Exhibit 1 for identification, which is a charge filed March 20, 1972 by Dr. Jones against the Rochester Musicians Association, Local 66, which I offer.

(Whereupon, the document above-referred to was marked Respondent's Exhibit 1 for identification.)

Mr. McCrory: No objection.

Mr. Novak: No objection.

Judge Klein: It is received.

(Whereupon, the document above-referred to heretofore marked Respondent's Exhibit 1, was received in evidence.)

Mr. Salzman: This is to be Exhibit 2.

(Whereupon, the document above-referred to was marked Respondent's Exhibit 2 for identification.)

We have Respondent's Exhibit 2 for identification, which is a copy of a letter on the letterhead of the National Labor Relations Board, dated March 20, 1972, related to that charge.

Mr. McCrory: No objection.

Mr. Novak: No objection.

Judge Klein: That is the Board's dismissal. Received.

(Whereupon, the document above-referred to heretofore marked Respondent's Exhibit 2, was received in evidence.)

[24] Mr. Salzman: This will be Respondent's Exhibit 3.

(Whereupon, the above-referred document was marked Respondent's Exhibit 3 for identification.)

We have Respondent's Exhibit 3 for identification, a copy of a letter on the letterhead of the National Labor Relations Board, the office of the General Counsel, dated August 9, 1972, denying the appeal in the previous matter.

Mr. Novak: No objection.

Mr. McCrory: No objection.

Judge Klein: It is received.

(Whereupon, the document above-referred to heretofore marked Respondent's Exhibit 3, was received in evidence.)

Mr. Salzman: Mark this Respondent's Exhibit 4.

(The document above-referred to was marked Respondent's Exhibit 4 for identification.)

We have Respondent's Exhibit 4 for identification, a copy of a letter on the letterhead of the National Labor Relations Board, dated March 23, 1972, denying injunctive relief on the original charge.

Mr. McCrory: No objection.

Mr. Novak: Your Honor, they asked for 10(j). We dismissed the charge and of course,—

Mr. McCrory: My stipulation is that these may go into evidence. I think they are the best evidence as to what their [25] contents are. And any description is not binding, obviously.

Judge Klein: Thank you very much. Those are all received, including Respondent's Exhibit 4.

(Whereupon, the document above-referred to heretofore marked Respondent's Exhibit 4, was received in evidence.)

Mr. Salzman: That is all we have.

Judge Klein: I wanted to add that off the record, before these stipulations in a discussion, I stated—I think I have not stated this on the record yet—I stated that as to Paragraph 5 of the Complaint, with respondent's admission that Jones was a statutory supervisor, I would not have received evidence concerning specifically his ability or authority to adjust grievances as such, since my understanding of Board Law is if he is a statutory supervisor, that is the end of the matter.

Mr. Salzman: May the record show—

Judge Klein: That was to protect you, Mr. Salzman.

Mr. Salzman: May the record show we were prepared to show evidence on that.

Mr. McCrory: So were we on the portion of Section 5 that was excluded.

Judge Klein: I excluded that because my understanding is with the admission of supervisory status, the other issue is immaterial. With that I again suggest that with no factual [26] issues to be decided, obviously no issues of credibility since there is no testimony, the parties might want to stipulate to waive decision by the Administrative Law Judge and refer the record to the Board for decision. It is a voluntary decision

with the parties. It will save a great deal of time and effort and money for the government and the parties.

Mr. Salzman: I am prepared to stipulate.

Mr. McCrory: I hate to be the fly in the ointment, but I would prefer to have your findings and ruling.

Mr. Novak: I would have to consult with my office. Right now, may I be excused?

Judge Klein: Off the record.

(Short recess taken.)

Judge Klein: Back on the record.

Under our rules, we are legally entitled to oral argument, but I think of the way you have presented the case, it is not necessary.

Mr. Novak: Your Honor, I do not think there is any need for closing statement or brief. The issues involved are outlined in my motion to strike the affirmative defense, and I will rest on that.

Judge Klein: I think the legal positions have been made clear.

Mr. Salzman: I would like the opportunity to submit [27] written memorandum of law.

Judge Klein: Yes.

Mr. McCrory: My own inclination is I do not feel I need to submit a brief. However, if Mr. Salzman is going to submit a brief, I would like a couple of days at least to respond to that.

Judge Klein: No. Our rules do not call for reply briefs. They are simultaneous briefs. That I can not change.

Mr. McCrory: Then I expect I should submit a brief myself.

Judge Klein: This will be very quick. Off record.

(Discussion off the record.)

Judge Klein: On the record.

Briefs maybe filed with the Chief Administrative Law Judge in Washington on or about July 30th.

Mr. McCrory: Now, as a matter of procedure, does that mean we mail it on July 30th or physically we deliver it in Rochester?

Judge Klein: That is why I picked the 30th, so you could have the weekend. With that being—

Mr. Novak: I do not know if I have to again renew my motion to strike the affirmative defense or not.

Judge Klein: No. I have taken that under advisement. I reserve ruling on that motion.

Mr. Salzman: Will we receive a copy of the transcript [28] before too many days?

Judge Klein: You have to arrange that with the reporter. With that, if there is nothing else, I thank Counsel for their cooperation. The Hearing is closed. (Whereupon, at 11:55 a.m., Hearing in the above-entitled matter was enclosed.

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